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Washington, DC
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January 30, 1997

Mr. William Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, D.C. 20554

Re: CC Docket No. 96-115

Dear Mr. Caton:

The Association of Directory Publishers ("ADP") hereby brings to the Commission's attention the attached January 23, 1997 decision of the California Public Utilities Commission ("CPUC") concerning directory listings. Among other things, the CPUC decision requires Pacific Bell and GTE to provide independent directory publishers with address information for their unpublished subscribers sufficient to allow directory delivery to those subscribers. That is critical because "only 30% of [PacBell's] residential subscribers publish their addresses." See Order at 17. The CPUC order also requires the LECs to provide residential "updates" on the same terms and conditions as made available to their directory affiliates. ADP notes that Pacific already provides business updates in California. In addition, the CPUC ordered an administrative law judge to begin a proceeding to determine whether PacBell's price of 10 cents per listing was excessive in that it reflected more than incremental or actual costs.

Relevant language from the CPUC order is supplied below.

A. Non-Published Directory Delivery:

"We therefore agree with ADP that LECs' withholding of the service addresses of unpublished telephone subscribers gives the LECs a competitive advantage over third-party

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vendors in providing timely and comprehensive delivery of directories." See Order at 27. [¶] "We conclude that LECs should be required to provide to third-party independent publishers the address, but not the name and telephone number, of unpublished LEC subscribers that move and change their address, for the limited purpose of delivering directories. The timely provision of this address information is necessary to prevent discriminatory treatment of third-party vendors in competing with LECs which are able to furnish their directories virtually immediately to such subscribers. Without access to these addresses, independent directory publishers cannot deliver their directories on a timely basis to those California subscribers who move to a new address with unlisted telephone numbers." See Order at 27-28. [Thus,] "Pacific and GTE shall provide the anonymous address, i.e., without name and telephone number of unpublished LEC subscribers who move to a new location . . . for the sole purpose of delivering directories." See Order at 37.

B. Residential Updates:

"We also conclude that independent publishers should be provided with the same updated information for the published residential address information which is made available to the LEC directory affiliate for purposes of secondary delivery of directories." See Order at 29 (emphasis in original). See also Order at 37.

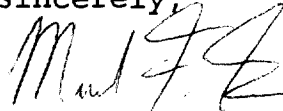
C. Excessive Tariff Rate For Subscriber Listings:

"We also note that ADP has raised questions concerning the reasonableness of Pacific's tariffed rate for directory access." See Order at 30. "Pacific [has] failed to provide adequate workpapers to support its contention that its rates properly reflected only the incremental or actual costs of providing the service." See id. (emphasis added). [Thus] the "Administrative Law Judge is directed to issue a procedural ruling calling for comments on whether to make existing directory access rates provisional" pending full review of Pacific's cost structure for the provision of subscriber list information. See Order at 38.

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Should you have any questions concerning the CPUC's decision or otherwise, please feel free to contact the undersigned.

Sincerely,

A handwritten signature in dark ink, appearing to read "Michael F. Finn", written over the word "Sincerely,".

Michael F. Finn

Enclosures

CC:

Bill Kehoe
Dorothy Attwood
Florence Setzer
Gayle Radley Teicher

ALJ/TRP/gab **

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Decision 97-01-042 January 23, 1997

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking on)
the Commission's Own Motion into)
Competition for Local Exchange)
Service.)

R.95-04-043
(Filed April 26, 1995)

Order Instituting an Investigation)
on the Commission's Own Motion into)
Competition for Local Exchange)
Service.)

I.95-04-044
(Filed April 26, 1995)

R.95-04-043, I.95-04-044 ALJ/TRP/gab **

DRAFT (WM)

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O P I N I O N

I. Introduction

By this decision, we address the outstanding issues in our local competition rulemaking relating to subscriber directory listings and access to directory listing information. We adopted initial interim rules addressing these issues in our Phase II Decision (D.) 96-02-072. We directed that unresolved issues relating to directory listings be addressed in technical workshops in Phase III of this proceeding. On April 1-3, and April 16, 1996, such workshops were held. By Administrative Law Judge (ALJ) ruling dated May 21, 1996, parties were directed to file comments on remaining disputed issues which were not resolved by the workshops.

Phase III comments were filed on June 10, 1996, by Pacific Bell (Pacific), GTE California Incorporated (GTEC), the California Telecommunications Coalition (Coalition),¹ the Association of Directory Publishers (ADP), Metromail, Pacific Lightwave, Inc./GST Lightwave, Inc., and the Office of Ratepayer Advocates (ORA). The Coalition separately filed an application for rehearing of D.96-02-072 on March 29, 1996, in which some of the issues raised were also addressed in their Phase III comments. The Commission subsequently issued D.96-09-102 denying the application

¹ The members of the the Coalition joining the comments were: AT&T Communications of California; California Cable Television Association; ICG Access Services, Inc.; MCI Telecommunications Corp.; Sprint Communications Company L.P.; Teleport Communications Group Inc.; and Time Warner AxS of California, L.P. The views expressed represent a consensus of the Coalition's members and do not necessarily reflect the views of each Coalition member. The motion for acceptance of the Coalition's late-filed comments is granted.

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for rehearing. On October 23, 1996, ADP filed a Petition for Writ of Review of D.96-09-102 in the California State Supreme Court. This decision addresses the remaining Phase III issues which were not resolved by D.96-09-102.² ADP also filed supplemental comments on July 30, 1996. Pacific filed a supplemental reply to ADP on October 4, 1996.

The assigned ALJ prepared a draft decision on directory listing issues which was mailed to parties of record for comment on November 15, 1996. While there were no evidentiary hearings on this matter, and there was no statutory requirement to circulate the proposed ALJ decision for comments, the assigned Commissioner wished to afford the parties an opportunity for comment. We have considered the opening and reply comments on the proposed ALJ decision and made revisions in the proposed decision where appropriate. Among the most significant changes we have made from the previous draft decision is the requirement that Pacific and GTEC provide third-party vendors with access to the anonymous address only of nonpublished customers solely for directory delivery purposes. We have also revised the decision to require GTEC to provide third-party database vendors nondiscriminatory access to its directory assistance database.

² On November 13, 1996, ADP filed a Petition for Modification of D.96-02-072, Conclusion of Law 29, which stated that the provision of subscriber listings by the local exchange carrier (LEC) is not an essential service. While this issue was decided in D.96-09-102, and challenged in ADP's Writ of Review Petition, legal counsel of the Commission has joined with ADP requesting that the Supreme Court delay reviewing the Petition for Writ of Review pending the disposition of ADP's November 13 Petition of Modification. Accordingly, in this decision, we make no final judgment on whether the provision of LEC subscriber listings is an essential service, pending disposition of ADP's November 13, Petition for Modification.

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II. Positions of Parties

A. Introduction

In this decision, we focus on the remaining disputed issues over directory access and publishing which have not been resolved through D.96-02-072 or the workshops. These issues relate principally to LEC/competitive local carrier (CLC) access and use of each other's directory listings, terms and prices for CLCs' inclusion in the customer-guide pages of LEC directories, and independent directory vendors' access to LEC directory databases.

The outstanding disputes over access to LEC/CLC directories and related database directory listings involve the conflicting interests of the incumbent LECs, CLCs (represented principally by the Coalition), independent directory vendors (represented by ADP and Metromail), and consumer interest groups (represented by ORA and The Utility Reform Network). While we adopted interim rules in D.96-02-072 addressing telephone directory and database-access issues, the LECs and CLCs continue to disagree over their reciprocal rights and obligations for access and use of each other's subscriber-list information. Parties also disagree over the terms and compensation with respect to CLCs' inclusion in the information section preceding the "White Page" listings in the LEC directory. Further, our interim rules for access to directory-listing databases adopted in D.96-02-072 did not resolve database-access issues raised by third-party vendors of directory information. In this decision, in addition to resolving outstanding LEC/CLC disputes, we shall also address access to directory databases by such third-party vendors.

Metromail is a wholly owned subsidiary of R.R. Donnelly & Sons Company, the world's largest commercial printer. Metromail's on-line-services group provides directory-assistance services to telecommunications companies and consumers through its National Directory Assistance product. Metromail's primary interest in this

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proceeding is the issue of third-party vendors' access to Directory Assistance (DA) listing information for use as an alternative DA service to the LECs.

ADP is a national nonprofit trade association composed of publishers of "independent" yellow page directories (i.e., other than those published by or for local telephone companies). ADP's interest in the proceeding is related primarily to the issue of third-party independent vendors' access to LEC and CLC directory-listing databases for purposes of publishing and delivering the vendors' own directories. ADP also disputes the rates being charged by Pacific for the rights to reproduce Pacific's directory listings.

In resolving the outstanding directory-listing access issues, disputes over access to DA databases can be distinguished from access to directory-listing databases used for publishing directories. While Pacific utilizes one unified data base both for DA and for publishing its subscriber directories, GTEC maintains two separate databases. One GTEC database contains listings used only for DA purposes. A second GTEC database contains listings used only for directory-publishing purposes. Each of the GTEC databases is separately accessed, maintained, and updated.

B. LEC/CLC Reciprocal Access to Directory-Listing Databases

In D.96-02-072, we required LECs to include CLCs' customers' telephone numbers in their "White Pages" and directory listings associated with the areas in which the CLC provides local exchange services, except for CLC customers wishing to be unlisted. (Rule 8.J.2) An unresolved issue, however, is what rights and obligations the LECs have concerning the use and dissemination of CLC customer listings which have been provided to them for inclusion in the LEC directory. A related issue is what reciprocal rights and obligations the CLCs have concerning access to LEC subscriber-listing information.

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Parties expressed differing views concerning the terms and conditions under which the LECs and CLCs may gain access to each others' directory-listing information, and how such information may be used. The Coalition argues that CLCs should have the same access to all local-exchange-subscriber information, as LECs do at no charge, because the LECs do not charge themselves to maintain the database.

Alternatively, in lieu of equivalent access, the Coalition believes CLCs should be compensated for any use of their customer information beyond the agreed-upon listing arrangement, since the CLCs retain a property right in their subscriber information in the same manner as the LECs. To the extent that CLC information is packaged and sold to independent directory publishers, for example, the CLCs should be compensated in precisely the same manner as the LECs, according to the Coalition, since LECs and CLCs are engaged in the same business and have collected and used subscriber information in the same way. The Coalition contends, however, that the LECs refuse to provide CLCs access to existing databases at no charge and refuse to compensate the CLCs for use of CLC subscriber information by either the LEC or third parties.

The Coalition argues that LECs have no right to use CLC subscriber information beyond the limited listings agreement. The Coalition objects to Pacific's intent to make CLC-subscriber information available to third-party vendors such as Metromail for their use in the sale of databases. The Coalition argues that Pacific can not arrogate to itself the right to furnish this information absent CLC consent and compensation since Pacific neither owns nor is licensed to sell this information.

ORA recommends that the LECs be ordered to submit written proposals for CLC compensation for subscriber information with one round of comments to follow prior to issuance of a decision.

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If a CLC requests that its subscriber-listing information not be provided to independent publishers, Pacific states that it will honor the request. Because it is the CLCs' choice of whether Pacific releases their information, Pacific does not intend to compensate the CLC for revenue obtained as a result of its provision of CLC subscribers' information to an independent publisher. The CLC is free to directly provide this information to independent publishers for compensation according to Pacific.

GTEC proposes to use CLC subscriber information only for the purposes of directory publication, and not to sell CLC-subscriber information to another party without CLC authorization. If a CLC so desires, GTEC would enter into an agreement to act as a service bureau for the provisioning of the CLC information.

GTEC currently provides its own published directory as a Category II tariffed service. Subscriber-list information was recently recategorized from Category I to II by the Commission in D.96-03-020, and the procedures for determining the prices for such Category II services are being addressed in the Open Access and Network Architecture Development (OANAD) docket. GTEC believes the current procedures provide more than a sufficient opportunity for the Commission staff and other interested parties to review the reasonableness of such rates.

C. Third-Party Directory Database Administrator

The Coalition believes that the LEC directory-listing database must be transitioned to an independent administrator, not unlike the transition taking place in the context of NXX Code administration. To that end, the Coalition requests that the presiding ALJ have the Telecommunications Division convene a workshop to discuss this process. The LECs and ORA disagree and argue that no need for a database administrator has been shown. Pacific states that no record has been developed for ordering the transfer of directory listings to a neutral third party. Pacific notes that the creation and maintenance of a neutral listing

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database would be a complex commercial venture, essentially transforming a private segment of industry into a quasi-governmental enterprise. Pacific contends that evidentiary hearings would be necessary before the database administrator issue is decided since, as the Commission has previously found, "complex technical issues...cannot be resolved absent evidentiary hearings."³

D. CLC Informational Listings in LEC Directories

1. Content and Space Allotments for CLC Information Listings

In our adopted rule in D.96-02-072, we required that LECs include information in its directory about each CLC on the same basis that the LECs include information about themselves or their affiliates. We did not, however, prescribe exactly what information about the CLC should be included in such informational listings nor did we prescribe how many pages should be allotted each CLC for this purpose. In Phase III comments, the CLCs and LECs expressed conflicting views on these issues.

Because CLCs and LECs are on an equal footing as certified local exchange providers, the Coalition argues that the unified directory mandated by the Commission must provide the CLCs equal access to that directory for basic information concerning services offered, customer-contact numbers, and other information such as that provided by the LECs to their customers in the directories. The Coalition states CLCs are not asking to replicate all of the information contained in the beginning of each LEC directory, nor provide promotional material. Rather, it is space for specific CLC information regarding establishment and provision of service that is sought.

³ Re Alternative Regulatory Frameworks for Local Exchange Carriers, D.90-08-06637 CPUC2d 226, 299, Conclusion of Law 2, p. 339; and D.91-07-044, 41 CPUC2d 1, 26 (requiring hearings to support the Commission's "objective judgment on the evidence").

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Because at some point the number of CLCs may increase so that the number of information pages in the directory may become cumbersome, the Coalition believes that a two-page limit on such information is feasible and reasonable. While AT&T has gone on the record as requesting four pages in the customer guide section of the directories, it is willing to negotiate for acceptance of one page. MCI argues that if GTEC is using more than a single page for itself in the customer guide section of its directories, then MCI would reserve a right to have more than a single page. MCI also observes that there may be a need for CLCs to provide more information based on how the Commission resolves the dispute over rate-center consistency. If the CLCs are required to disclose in their customer guide pages what calling areas or NXXs are rated as local, MCI states that one page would not provide enough space for a CLC.

Disputes over this issue focus on GTEC's proposal. Pacific has generally been able to reach accommodation with CLCs through negotiation. GTEC currently publishes approximately 100 directories within California, and proposes to allow each CLC to purchase one full page in each directory on which to discuss the CLC's products and services. GTEC offers to list at no charge the CLC's business office, billing inquiry, and repair numbers. In the table of contents of its directory, GTEC offers to provide, at no charge, each CLC's logo and page number reference where these customer-contact numbers can be found. While GTEC offers these terms on a voluntary basis, GTEC objects to being required to provide CLCs more than one free page for informational listings or to reduce its proposed rate for additional pages.

GTEC claims a First Amendment right to control the form and content of the information pages of its directories, which it has never held open to outside parties. (See, Pac. Gas & Elec. Co. v. Public Util. Comm'n, 475 U.S. 1, 8-9 (1986) (PG&E) (utility has First Amendment right in contents of billing envelopes); Central

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Ill. Light Co. v. Citizens Util. Bd., 827 F.2D 1169, 1174 (7th Cir. 1987) (same). GTEC argues that Supreme Court precedent holds that under the First Amendment, the Commission may not compel GTEC to allow CLCs more space in the information pages than GTEC is willing to provide on a voluntary basis. (See, PG&E 475 U.S. at 11-12; Central Ill. Light, 827 F.2d at 1174.) To do so, according to GTEC, would impermissibly force it "to alter [its] speech to conform with an agenda [it has] not set." (PG&E, 475 U.S. at 9.) Even if the Commission had a compelling interest in making a variety of views available to customers (a point GTEC does not concede), GTEC argues this interest cannot justify forcing GTEC to incorporate third-party promotional material with which it disagrees into the information pages of its directories.

GTEC further argues that a Commission order requiring it to include competitor marketing information in its directories will decrease the directory's value to GTEC and cause GTEC to lose brand identity and consumer good will. (See, Basicomputer Corp. v. Scott, 937 F.2d 507, 512 (6th Circ. 1992.)

2. Charges for CLC Inclusion in LEC Directories

The Coalition believes that CLCs should be treated in a nondiscriminatory fashion vis-a-vis the LECs for any charges for CLC informational listings in LEC directories pursuant to Public Utilities (PU) Code §§ 453 and 532. Thus, if Pacific pays itself or its affiliate, Pacific Bell Directory, for inclusion of this information, CLCs should also pay for such inclusion. However, if Pacific does not pay itself or Pacific Bell Directory for this service, the Coalition believes CLCs should be treated no differently.

Pacific proposed to recover the actual costs for inclusion of CLC information in its directories. Pacific set no limit as to the number of pages that the CLC can request, but required full compensation for the costs associated with these pages. Pacific believes the existing tariff, which allows

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interexchange carriers to put information in Pacific's directories as approved in D.94-09-065 ("IRD"), should apply to CLC information. Pacific objects to CLCs paying what Pacific pays for its own directory information listing.

GTEC submits that its current rate for a yellow-page advertisement is the most reasonable surrogate and most fairly represents the value to a CLC in having its products and services advertised in GTEC's directory. In order to ensure equal treatment of all CLCs, GTEC proposes to charge a standard price for all such pages.

GTEC proposes to discount the price of a one-page advertisement 35% off the price that it charges for a comparable yellow-page advertisement. This is the largest discount that GTEC offers its own customers that purchase a full-page ad in the yellow pages. GTEC's rate would apply to any pages in excess of the free table-of-contents listing in which GTEC proposes to include each CLC. As mentioned above, the free table-of-contents page will at least display the CLC's name and a reasonably dimensioned logo. GTEC would also list the CLC's "Products and Services" page in the directory's table of contents so that consumers can locate these CLC-information pages easily. GTEC claims that the proposal to include CLC-products-and-service pages will likely cause GTEC to incur additional costs for increased formatting procedures, such as page breaks and filler pages that will not be accounted for.

Several CLCs objected to GTEC's proposed 35% discount for CLC inclusion in GTEC directories as discussed at the April 16, 1996, workshop. CCTA/Time Warner object on the grounds that a rate equal to 65% of the yellow-page advertising rate was not based upon GTEC's cost, but upon GTEC's current market rates to retail advertisers. CCTA/Time Warner contend that CLCs should be charged no more than the cost which the LECs themselves incur to be included in their own directories. CCTA/Time Warner believe the one-page limitation may be acceptable to smaller CLCs.

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ORA states no evidence has been offered or appropriately tested in evidentiary hearings regarding the rate to be charged for directory information listings. Consequently, ORA is unable to make a recommendation on this issue at this point. ORA can only suggest that any rates to be charged for directory information listings of CLCs by LECs be set at total-service long-run incremental cost (TSLRIC) in the OANAD proceeding.

E. Independent Third-Party Vendors' Access to LEC/CLC Subscriber Information for Directory Publishing

ADP, representing the interests of independent directory publishers, claims that independent publishers are being unfairly denied access to certain directory-listing information by Pacific. ADP argues that Pacific has an unfair competitive advantage in providing published customer directories, compared with independent directory publishers. For example, the incumbent LEC is able to provide directories to its subscribers immediately upon institution of telephone service. ADP identifies two categories of directory-listing information to which Pacific has denied access:

(1) addresses of new nonpublished LEC customers and (2) timely updates of published Pacific white-page-directory listings.

1. Access to Nonpublished Addresses

ADP states that no independent directory publisher can deliver its directory to a new telephone customer who is nonpublished⁴ because the LECs have denied independent directory publishers access to street-address information of nonpublished customers. ADP asserts that this is a serious competitive

⁴ As used in this discussion, "nonpublished" includes unlisted customers. In addition to being unlisted in any telephone directory, nonpublished service also means that the customer's name, address, and phone number are excluded from the directory-assistance records available to the general public by dialing 411.

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disadvantage, particularly in light of the fact that nonpublished customers constitute 40% of all telephone subscribers.

ADP recognizes that the names and telephone numbers of nonpublished subscribers must remain private and cannot be disclosed to third-party vendors. In the interest of competitive fairness, however, ADP contends that the LECs should be required to provide the addresses, but not the names or telephone numbers, of nonpublished telephone subscribers for delivery purposes only. ADP acknowledges that addresses are needed only for those nonpublished subscribers that move and change their addresses. Presently, Pacific provides this address information to a third-party delivery contractor, Product Development Corporation (PDC) for delivery of Pacific's directory. (See e.g.; D.91-01-016 at 42.) ADP argues that independent directory publishers should be treated no differently than Pacific treats itself while protecting customer privacy rights. Thus, that same subscriber-address information given to PDC should be provided to other third-party delivery contractors for directory delivery on behalf of independent directory publishers, according to ADP.

As ADP notes, the United States Supreme Court observed in Feist v. Rural Tel. Serv., 499 U.S. 340, 342-343 (1991), that LECs, as the sole providers of telephone service in their area, "obtain subscriber information quite easily" and subscriber-list information is the essence of the "business" of the LEC--that information must be obtained and maintained in order to provide telephone service. In contrast, the Court found that since competing directory publishers are not telephone companies, they are without monopoly status and "therefore lack independent access to any subscriber information." Id. at 343.

ADP believes that § 222(e) of the Telecommunications Act (the Act) further supports its claim for access to nonpublished addresses. §222(e) provides that:

"a telecommunications carrier that provides telephone exchange service shall provide

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subscriber list information gathered in its capacity as a provider of such service on a timely and unbundled basis, under nondiscriminatory and reasonable rates, terms, and conditions, to any person upon request for the purpose of publishing directories in any format."

Pacific disagrees with ADP that its members require nonpublished addresses from the LECs, arguing there are a number of other potential sources of the address information which independent publishers desire. According to Pacific, information may be available from electric, gas, and water utilities, and from cable TV or newspaper companies. Pacific further argues that this issue has been adjudicated elsewhere, and the prevailing is that subscriber information is not an "essential facility".⁵

Pacific claims that access enabling third-party distributors to deliver ADP-members' telephone books to the addresses of nonlisted subscribers is not within the Act's definition of subscriber-list information, is confidential under PU Code §§ 2891 and 2891.1 and Pacific's Tariff Rules 34 and 35, (see Pacific Schedule A2 1st Revised Sheet 136 2.1.34 A.1.a.) and therefore, cannot be released.

GTEC contends that ADP's request for nonpublished addresses is contrary to § 222(f)(2) of the Act. This Section defines "subscriber list information" that must be made available to others for purposes of publishing directories as only those subscriber names, addresses and telephone numbers which the carrier or an affiliate thereof has published in any directory format. Since GTEC does not publish the addresses of its subscribers who have nonlisted service, GTEC contends those addresses are thus

⁵ See Directory Sales Management Corp. v. Ohio Bell Telephone Co., 833 F2d 606 (6th Cir. 1987); White Directory of Rochester, Inc. v. Rochester Telephone Corp., 714 F.

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unavailable to independent directory publishers under § 222(e) and (f) of the Act. In addition, § 222(a) places upon each telecommunications carrier the duty to protect the confidentiality of such proprietary customer information. GTEC contends that it would violate the privacy rights underlying nonpublished service, as well as the express provisions of the Act, to require GTEC to provide the address on nonlisted subscribers to independent directory publishers.

ADP disputes Pacific's claim that release of this information is contrary to PU Code §§ 2891 and 2891.1, and Pacific's Rules 34 and 35. ADP claims §§ 2891 and 2891.1 only proscribe the provision of unpublished telephone numbers of residential subscribers and do not prohibit the release of address information for delivery purposes only. Similarly, ADP asserts that Pacific Rule 35 do not prohibit the release of the address information, while Pacific Rule 34 -- which governs nonpublished service -- proscribes the listing of "customer name, address, and telephone number" absent customer request. ADP does not seek access to either the customer name or telephone number of nonpublished customers. By seeking access to only the nonpublished address, ADP does not believe there is any violation of Rule 34.

ADP also disputes Pacific's claim that mere release of this address information for directory-delivery purposes violates federal customer proprietary network information (CPNI) requirements. ADP notes that Ameritech, one of the Regional Bell Operating Companies (RBOCs) offers this address information to independent directory publishers for delivery purposes only. Bell Atlantic subsidiaries such as Bell of Pennsylvania also offer this service.

Pacific claims that the issue of who owns subscriber list information and what rights such ownership entails was fully addressed by the parties in the Customer List OII (I.90-01-033) and is not a relevant issue to local exchange competition. Pacific

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claims that customer information gathered by the utility is owned by the utility. Pacific claims that ownership of customer listing information is specifically reserved to it in its tariff,⁶ and that ownership of telephone numbers is specifically denied to customers in its tariffs.⁷ Utility tariffs have the force and effect of law.⁸ Ownership of customer information is held by the gathering company in nonregulated industries.⁹ Under the law, public utilities own their assets in the same manner as private businesses.¹⁰

ORA is concerned about the potential negative privacy implications of releasing subscriber information to any third party. Nonetheless, ORA is also concerned about the ability of competitors to gain a foothold in the marketplace. Therefore, ORA supports a Commission rule requiring provision of the subscriber address only to independent directory publishers or their delivery-service providers solely for the purpose of directory delivery.

2. Access to Updates of Published White Page Listings

ADP also claims that Pacific refuses to provide white-page updates of its published address listings to independent

⁶ Cal. P.U.C. Schedule No. A12.1.1.C.7

⁷ Cal. P.U.C. Schedule No. A2.1.17.

⁸ See Colich & Sons v. Pacific Bell, 198 Cal.App.3d 1232 (1988) and citations herein contained.

⁹ Person v. Dodd, 410F.2d 701, 807 (D.C. Cir. 1969), cert. denied 89 Ct. 2021 (1969) ("Where information is gathered and arranged at some cost and sold as a commodity on the market, it is properly protected as property.")

¹⁰ Duquesne Light Company v. Barasch, 488 U.S. 229, 307 L.Ed.2d 646, 109 S.Ct. 609 (1989). ("Although [utility] assets are employed in the public interest to provide consumers of the state with electric power, they are owned and operated by private investors.").

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directory publishers in violation of Local Competition Rule 8.J.(1) and the Act.

Thus, not only is Pacific denying independent directory publishers the ability to deliver their directories to nonpublished telephone subscribers, it is also preventing delivery of independent directories to publicly listed customers who change locations, according to ADP. Published directories contain a substantial amount of obsolete data that further deteriorates over time. ADPs' concern is the timeliness of data provided.

Pacific replies that it currently provides directory publishers listing updates for business subscribers only. Pacific does not provide daily or weekly updates of the Subscriber List Information for residential subscribers to third-party vendors nor its own directory affiliate, nor does Pacific have the system capabilities to provide such updates. Because only 30% of its residential subscribers publish their addresses, Pacific claims that a published update of daily residential-listing activity would have limited usefulness to independent directory publishers. Pacific does, however, provide its own directory affiliate with a daily service order activity file with subscribers' service addresses from which secondary directory-delivery service is provided.

F. Rates for Third-Party Access to LEC Directory Listings

ADP objects to the rates charged by Pacific for access to its directory listings. ADP observes that Bell South prices its directory listings at only \$0.04 per initial listing, yet Pacific has been charging approximately \$0.17 and filed an advice letter to

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lower this to \$0.10 per listing.¹¹ ADP believes that its members should be entitled to acquire such information merely for the incremental cost of reproducing the information--which the LECs have acquired only as a result of the provision of monopoly local exchange service--plus the minimum allowed rate of return. In that regard, ADP claims Pacific's \$0.10 rate is excessive, while Bell South's rate, though still high, is minimally acceptable. The costing analysis prepared by the Florida Public Service Commission indicates that Bell South's cost per listing was \$0.003 for the Directory Publisher's Database Service (DPDS), while the cost per Business Activity Report was \$0.004. Hence, the \$0.04/listing charge allowed by the Florida Commission was over 1200% above cost, yet still \$0.06/listing less than the provisional rate allowed Pacific.

Citing the legislative history of § 222(e) of the Act, ADP contends that charges to independent directory publishers must be based on the "actual or incremental cost of providing the listing to the independent directory publisher...." (See Statement of Representatives Paxon and Barton, House Conferees for A96, § 222(e).)

Pacific claims the issue of what should determine reasonable rates for the provision of subscriber-listing information to independent directory publishers was resolved in D.96-02-072. The Commission states in D.96-02-072: "We find that Pacific's proposed revisions to its Reproduction Rights Tariff are

¹¹ ADP protested Pacific's advice letter on May 1, 1996, for its failure to comply with Local Competition Rule 8.J.(1) and § 222(e) of the Act. By letter dated June 11, 1996, from the Director of the Telecommunications Division to the ADP Counsel, Pacific's proposed rate of \$0.10 per listing has been made effective. ADP was advised that it may utilize additional remedies available under the Commission's rules of Practice and Procedure if it believed further Commission actions on its protest was required.

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reasonable and should be adopted." (Decision at 48.) Therefore, since the Commission found certain tariff revisions proposed by Pacific to be reasonable, Pacific claims that its overall rates (filed via Advice Letter 18155 on April 11, 1996) are market priced and reasonable for the provision of subscriber-listing information to independent directory publishers. Pacific filed its tariff offering for subscriber-listing information to be used for DA applications on August 21, 1996, with an effective date of October 1, 1996.

G. Access to LEC/CLC Subscriber Database for DA

GTEC claims any CLC which obtains GTEC's subscriber-listing information pursuant to § 222(e) of the Federal Telecommunications Act of 1996 must use such information only for "purpose of publishing directories," and not for other ends such as DA. Section 222(e) recognizes that such directories may be in "any format," which includes traditional paper directories, as well as on-line access, electronic media, or CD-ROM.

GTEC contends that this requirement of § 222(e) moots the request of Metromail that it be allowed to obtain GTEC's DA-list information not for "purpose of publishing directories," but for DA purposes. Moreover, in D.96-02-072, the Commission reviewed the issues surrounding the provisioning of DA service, and made no provision requiring GTEC to accede to Metromail's request.

GTEC further believes that insertion of this issue in this proceeding is inappropriate and has little relevance to local competition since Metromail is not a CLC, and the sale of DA listings is not a "telecommunications service" as defined under the Act. GTEC denies that access to its DA listings is necessary for Metromail to conduct its business, for Metromail has managed to obtain listing from a variety of sources up to this point. The fact that Pacific may choose to sell its directory listings to third parties is a business decision of that company. GTEC denies it has any duty to do likewise.

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Metromail disagrees with GTEC's claims regarding DA. While GTEC claims that Sec. 222(e) of the Act moots Metromail requests for DA listings, Metromail responds that § 222(e) is irrelevant since Metromail bases its request on the requirements of § 251(b)(3) and § 251(c) of the Telecommunications Act, and not on § 222(e).

Metromail states that nondiscriminatory access to directory listings is also required by the FCC in its adopted order implementing the local-competition provisions of the Act (CC Docket 96-98).

Paragraph 101 of the FCC order concludes that:

The term 'nondiscriminatory access' means that a LEC that provides telephone numbers, operator services, DA, and/or directory listings ("providing LEC") must permit competing providers to have access to those services that is at least equal in quality to the access that the LEC provides to itself.

Metromail states that under § 251(b)(3) of the Act, LECs, must share subscriber listing information with their competitors, in "readily accessible" tape or electronic formats, and in a timely fashion upon request. The FCC's in requiring "readily accessible" formats was to ensure that no LEC, either inadvertently or intentionally, provided subscriber listings in formats that would require the receiving carrier to expend significant resources to enter the information into its systems.

Metromail notes that in recent arbitration orders the Commission has recognized directory listings as a "network element" to be unbundled and provided "by magnetic tape and that Entrant will reimburse incumbent for the cost of the medium and reasonable shipping and handling." (A.96-08-068.) Under the Act, § 251(c) requires that all "Network Elements" be made available on a unbundled basis.

While Metromail does not dispute the fact that it is not a "competing provider" of local exchange or toll service, Metromail

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contends that this point is irrelevant. In its order, the FCC rejected proposals to limit the application of § 251(b)(3) to competing providers of exchange and/or resellers of toll service (See 117 and 136.) Metromail argues that Paragraph 101 of the FCC order defined the term "competing providers" in a much broader scope:

Such competing providers may include, for example, other LECs, small business entities entering the market as resellers, or CMRS providers.

Metromail does not believe that the statutory and regulatory requirements permit GTEC to "pick and choose" who is and who is not a competitor. Metromail contends it is a competing provider of DA service to GTEC.

Metromail argues that in order to comply with the Act and the FCC order and to be consistent with the Commission's intent to unbundle competitive services and the Commission, at a bare minimum, must require that subscriber-list information be made available on a nondiscriminatory basis for DA.

III. Discussion

A. Interrelationship of Issues Common to the List OII (I.90-01-033)

As a procedural matter, we note that certain issues that have been raised in parties' comments substantially overlap with issues which were previously designated for consideration in I.90-01-033 regarding competitive access to customer-list information. I.90-01-033 was instituted on January 24, 1990; it has been dormant for approximately the last five years. Nonetheless, we recognize that the issues over competitive access to directory-listing information currently being addressed in the local competition rulemaking were also previously raised I.90-01-033. Thus, to avoid duplication or fragmented treatment of